

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	DECISION
In the Matter of Protest of:)	
)	CASE No. 2011 - 119
)	
Lanier Parking)	
)	
)	
Medical University of South Carolina)	POSTING DATE: August 15, 2011
RFP No. 4806-3/15/11-9437-Z)	
)	MAILING DATE: August 15, 2011
<u>Valet Parking Service</u>)	

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Lanier Parking. With this request for proposals (RFP), the Medical University of South Carolina (MUSC) attempts to procure valet parking services for the following three locations: Ashley River Tower at 25 Courtenay Drive, Hollings Cancer Center at 86 Jonathan Lucas Street, and Rutledge Tower at 135 Rutledge Avenue. In the letter, Lanier protested MUSC's intent to award to Ambassador's Plus (Ambassador).

In order to resolve the matter, the CPO conducted a hearing August 5, 2011. Appearing before the CPO were Lanier, represented by Wade Mullins, Esq.; Ambassador, represented by Alex Shissias, Esq.; and MUSC, represented by Joe Good, Esq.

NATURE OF PROTEST

The letter of protest and amended protest letter are attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On February 10, 2011, MUSC issued the RFP. (Ex. 1)
2. On February 23, 2011, MUSC conducted a pre-proposal conference.
3. On March 9, 2011, MUSC issued Amendment #1. (Ex. 2)
4. On March 15, 2011, MUSC issued Amendment #2. (Ex. 3)
5. On March 29, 2011, MUSC opened the 9 proposals received. (See Ex. 6 for the tabulation)
6. On May 13, 2011, after evaluating the offers received, MUSC posted its intent to award to Ambassador. (Ex. 11)
7. On May 16, 2011, MUSC posted a revised intent to award to correct the effective date. (Ex. 12)
8. On May 24, 2011, Lanier submitted its protest.
9. On May 31, 2011, Lanier amended its protest letter.

MOTION TO DISMISS

At the hearing, Ambassador moved to dismiss any issue regarding alleged Clarifications or Discussions as untimely because it was not raised in the protest letter or amended protest letter and therefore the CPO lacked jurisdiction. The CPO held the motion in abeyance and proceeded with the hearing. The CPO now finds that Ambassador's motion to dismiss should be granted for the reason set forth under the CPO's conclusions of law for Amended Protest Letter, Protest Issue No. V.

CONCLUSIONS OF LAW

I. Allegation that “[u]pon information and belief, MUSC erred in its determination that Ambassador was a responsible bidder” (Amended Protest Letter No. I)

Lanier Parking challenged MUSC's responsibility determination. Only a responsible offeror may be awarded a contract. S.C. Code Ann. 11-35-1530(9). The South Carolina Consolidated

Procurement Code (“Code”) defines a responsible offeror as one “who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.” Section 11-35-1410(6). According to the South Carolina Procurement Review Panel (“Panel”), the procurement officer is obligated to determine responsibility before award and may consider any source of information. Protest of CollegeSource, Inc., Case No. 2008-4; See also, S.C. Code Ann 11-35-1810(1); Reg.19-445.2125(B). A procurement officer’s responsibility determination is a matter of discretion and cannot be overturned unless the protestant shows it was “clearly erroneous, arbitrary, capricious, or contrary to law.” S.C. Code Ann. 11-35-2410(A).

At the hearing, Cheryl Wolfe, MUSC’s procurement manager, testified that she determined Ambassador to be a responsible offeror after checking Ambassador’s references, verifying its vendor registration and that it had not been debarred, and obtaining Ambassador’s financial statements and a Dun & Bradstreet report. Lanier Parking offered no evidence that the responsibility determination was clearly erroneous, arbitrary, capricious, or contrary to law, and this protest allegation is denied.

To the extent that its protest letter also alleged that MUSC failed to apply preferences pursuant to Section 11-35-1524 of the Code, Lanier Parking withdrew this allegation at the hearing.

II. Allegation that “LP is the lowest responsive, responsible bidder and the award should be made to LP” (Amended Protest Letter No. II)

In its protest letter, Lanier Parking contended that it should have received the award because its proposal had included capital improvements and the installation of new technology which would substantially increase parking revenues. At the hearing, it appears that Lanier Parking abandoned this ground. However, to the extent it is still before the CPO, the CPO finds that it is without merit. The

RFP did not require the above items. (Ex. 1) Further, in Protest of Travelsigns, Case No. 1995-8, the Panel noted that “[a]n offeror’s claim to be superior to other offerors is fruitless because the Panel has consistently held that it will not substitute its judgment for the judgment of the evaluation committee which determines the ranking of the offerors.”; See also, Protest of Transportation Management Services, Case No. 2000-3.

III. Allegation that “MUSC erred in its determination that AP (Ambassador) submitted a responsive proposal. Upon information and belief, AP submitted a non-responsive proposal, which include but are not limited to the following:”

(a) Allegation that Ambassador’s proposal was non-responsive because “[t]he AP Proposal failed to comply with and took exception to the Requirements set forth in Section III Scope of Work/Specifications” (Amended Protest Letter No. III(a))

At the hearing, Lanier Parking withdrew this protest issue.

(b) Allegation that Ambassador’s proposal was non-responsive because “[t]he AP Proposal failed to comply with the mandatory material requirements of Section IV, Information for Offerors to Submit, including but not limited to Section IV.B, IV.C, IV.E, IV.F and IV.H” (Amended Protest Letter No. III(b))

Lanier Parking also withdrew this protest issue at the hearing.

(c)Allegation that Ambassador’s proposal was non-responsive because “[t]he AP Price Proposal failed to comply with the mandatory essential requirements of the RFP” (Amended Protest Letter No. III(c))

Lanier Parking’s protest letter explained that it believed Ambassador’s Price Proposal was non-responsive because it failed to address that MUSC is losing parking revenue and provide a plan to address it. However, at the hearing, Lanier Parking’s contention was that the Price Proposal was non-responsive on its face for other reasons, such as claiming it was improperly submitted as part of the Technical Proposal, that Ambassador had modified the

Bidding Schedule, and that MUSC's evaluation of price included information improperly obtained by the procurement manager in Discussions.

First, nothing in the RFP or its amendments requires the price proposals to address loss of parking revenues. (Ex. 1-4) Therefore, there is no evidence Ambassador was non-responsive in this regard.

With regards to the additional non-responsive claims raised at the hearing, Section 11-35-4210(2) of the Code requires that the grounds of the protest be set forth in the protest letters with enough particularity to give notice of the issues to be decided. Where a protest letter fails to do so, the Panel has found that the protest issue must be dismissed as untimely. Protest of DP Consultants, Case No. 1998-6. Here neither the protest letter nor its amendment stated these additional issues, and they are dismissed as untimely. Notably, Lanier Parking's challenge to the responsiveness of Ambassador's Price Proposal based on the procurement manager's alleged actions is clearly not an issue of responsiveness; instead Lanier Parking attempts to raise a new issue alleging that Discussions were improperly conducted, which was not raised in either the protest letter or the amended letter and is untimely as set forth in more detail under the CPO's conclusions of law for Amended Protest Letter No. V.

In the event that the protest letters did sufficiently set forth a claim that Ambassador's Price Proposal was non-responsive for being submitted as part of the Technical Proposal and if Lanier Parking did not withdraw this contention at the hearing, the CPO finds that this issue must be denied. Ms. Wolfe appeared to testify that Ambassador submitted both Technical and Price Proposals and explained that she tore them apart and did not send the Price Proposal to the evaluators. Further, if the allegation of modification to the Bidding Schedule was sufficiently raised by the protest letters, the CPO finds that Lanier Parking offered no evidence at the

at the hearing in support of its contention, not even Ambassador's Price Proposal. Accordingly, this ground is denied due to Lanier Parking's failure to meet its burden of proof.

IV. Allegation that "[t]he Evaluation Panel's scoring of the Proposals was arbitrary and capricious and failed to properly consider the information submitted by LP in its proposal which resulted in the proposed award to a vendor whose proposal was not most advantageous to MUSC" (Amended Protest Letter No. IV)

Again, Lanier Parking's protest letter contended that evaluators failed to "give an accounting of the added value" of its proposal for including capital improvements and installing new technology. At the hearing, it appears that Lanier Parking abandoned this ground. However, to the extent it is still before the CPO, the CPO finds that it is without merit. The RFP did not require the above items. (Ex. 1) Further, in Protest of Travelsigns, Case No. 1995-8, the Panel noted that "[a]n offeror's claim to be superior to other offerors is fruitless because the Panel has consistently held that it will not substitute its judgment for the judgment of the evaluation committee which determines the ranking of the offerors."; See also, Protest of Transportation Management Services, Case No. 2000-3.

V. Allegation that "[t]he Evaluation Panel's scoring of the Proposals was arbitrary and capricious and failed to properly consider the established award criteria" (Amended Protest Letter No. V)

The allegation raised in Lanier Parking's protest letters was that the evaluation panel members had acted erroneously, arbitrarily and capriciously in their scoring because they failed to consider the established award criteria. In contrast, Lanier Parking argued at the hearing that the procurement

manager erroneously engaged in Discussions with offerors and then she improperly provided the information received to evaluators thereby rendering their scoring arbitrary and capricious.

The CPO finds that these two allegations are not the same thing. Section 11-35-4210(1)(b) of the Code reads, in relevant part:

Any actual...offeror...who is aggrieved in connection with the intended award...of a contract shall protest to the appropriate chief procurement officer...within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code...

Further, Section 11-35-4210(2) requires that the grounds of the protest be set forth in the protest and amended protest letters with enough particularity to give notice of the issues to be decided. Where a protest letter fails to do so, the protest issue must be dismissed as untimely. See Protest of DP Consultants, Case No. 1998-6. Here neither the protest letter nor its amendment stated it was challenging the procurement manager's action. Since it was first raised at the hearing, the CPO has no authority to rule on Lanier Parking's allegation that Discussions were improperly conducted, and information was improperly provided that rendered the scores arbitrary and capricious. Accordingly, that allegation is dismissed as untimely.¹

As to the issue that was raised alleging that the evaluators' scoring was erroneous, arbitrary and capricious because it failed to follow the award criteria, the CPO finds this allegation to be without merit. A determination by the State as to which proposal is the most advantageous is final and

¹ At the hearing, Lanier Parking argued that it should be afforded latitude from the notice requirement of Section 11-35-4210(2) of the Code because MUSC failed to respond to its Freedom of Information Act ("FOIA") request in time for Lanier Parking include this ground in its protest. In Protest of Transportation Management Services, Case No. 2000-3, the Panel addressed a protestant's argument that it could not adequately set forth the protest grounds because it had not received a response to its FOIA request in time. In that case, the Panel held that the protestant was bound by the deadline in 11-35-4210 and the argument to the contrary failed to state a claim. Id.; See also Protest of Atlas Food Systems and Services, Case No. 1997-6. Moreover, according to Ms. Wolfe, Lanier Parking waited to send its FOIA request to MUSC until May 25, which was the day before its protest was due. The Panel has held that persons doing business with the State are required to know the provisions of the Code, including the time limitations on protests, in order to protect their rights. Protest of First Hospital Products, Inc., Case No. 1989-15. The CPO also notes that Lanier Parking could have known of this ground because it had received similar correspondence.

conclusive unless such determination is “clearly erroneous, arbitrary, capricious, or contrary to law.” S.C. Code Ann. Section 11-35-2410(A). On several occasions, the Panel has held that it will not re-evaluate proposals and will not substitute its judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as they follow the requirements of the Code and the RFP, fairly consider all proposals and are not actually biased. See, e.g. Protest of Santee Wateree Regional Transportation Authority, Case No. 2000-5; Protest of First Sun EAP Alliance, Case No. 1994-11; Protest of Volume Services, Case No. 1994-8; Protest of Coastal Rapid Public Transit Authority, Case No. 1992-16. These cases also make it clear that the protestant bears the burden of proof to demonstrate by a preponderance of the evidence that the evaluators’ determinations were flawed. Id.

Here the RFP indicated that offers would be evaluated using the following factors:

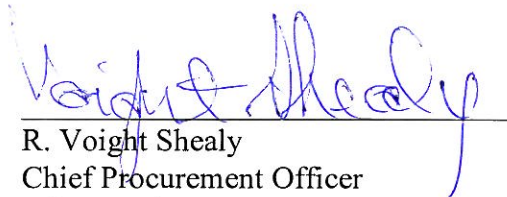
- I. Proposed Valet Service Management and Operations Plan
- II. Cost Proposal
- III. Resumes
- IV. References and Financial Stability. (Ex. 1, p. 19)

The evaluation scoring sheets provided to the CPO reflect that the proposals were scored based on the above four factors. (Ex. 15 & 16) No evaluators were called to provide any testimony to the contrary. Instead Lanier Parking argued that the fact that Evaluator #1 had commented it did not provide resumes for local staff rendered its evaluation arbitrary and capricious because the RFP did not require resumes for local staff, only managers. However, that argument does not prove that the evaluator misunderstood or deviated from the established award criteria. Lanier Parking also alleged that Evaluator #4’s scoring was arbitrary and capricious because the percentage grade given and the comments indicate he or she could not have followed the scoring guidelines provided on the bottom of the scoring sheets. (Ex. 15 & 16) However, these were merely MUSC’s guidelines on one possible

approach and do not render this evaluator's scores arbitrary and capricious. Accordingly, the CPO finds that Lanier Parking failed to prove by a preponderance of the evidence that the evaluation panel's scored was arbitrary and capricious and failed to follow the established award criteria.

DETERMINATION

For the aforementioned reasons, the protest is denied.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services



Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised July 2011)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the General Appropriations Act for Fiscal Year 2011-2012, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, an incorporated business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

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VIA HAND DELIVERY

Chief Procurement Officer
Materials Management Office
1201 Main Street
Columbia, SC 29201

**Re: Lanier Parking
Supplemental RFP Award Protest – MUSC Valet Parking Service
Solicitation No.: RFP #4806-3/15/11-9437-Z
Contract Number: PO654280
Our File No: 1219/10-0134**

Dear Chief Procurement Officer:

This firm represents Lanier Parking ("LP") in connection with the above-referenced RFP Protest. On behalf of LP, we hereby protest the intent to award the MUSC Valet Parking Service to Ambassador's Plus, ("AP") and request a hearing and administrative review. Medical University of South Carolina ("MUSC") originally posted the Modified Intent to Award on May 16, 2011. LP, as a bidder in this procurement and, pursuant to S.C. Code Ann. § 11-35-4210(1), has standing to pursue a protest. Although LP has diligently pursued information by filing a FOIA request with MUSC, the protest is made without the benefit of a response to the FOIA, understanding, of course, that MUSC is giving their best efforts in preparing a response. The protest is based upon the following factual and legal basis:

I. Upon information and belief, MUSC erred in its determination that Ambassador was a responsible bidder.

S.C. Reg. 19-445.2125 sets forth the factors to be considered by the State in determining the responsibility of a prospective vendor. They include whether a prospective vendor has:

- (a) available the appropriate financial, material, equipment, facility and personal resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (b) a satisfactory record of performance;
- (c) a satisfactory record of integrity;
- (d) qualified legally to contract with the State; and
- (e) Supplied all necessary information in connection with the inquiry concerning responsibility.



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LP contends that AP is a non-responsible vendor and that the procurement manager's determination that AP was a responsible bidder was arbitrary, capricious and erroneous as a matter of law. Upon information and belief, AP did not provide sufficient financial information to support a determination that it had the appropriate financial and other resources to meet all contractual requirements. Furthermore, LP contends that the information submitted by AP does not sufficiently support a determination that AP has the experience, qualifications and expertise to meet all the contractual requirements of a contract of this nature and size. Moreover, AP is not an in-state company with sufficient contact to South Carolina to be granted in-state preference which should have been given to LP.

The facts dictate a determination that AP is a non-responsible bidder. MUSC's responsibility determination was arbitrary, capricious, based on mistaken and incomplete information. AP's bid should be rejected; the intent to award cancelled and the award should be made to LP.

II. LP is the lowest responsive, responsible bidder and the award should be made to LP.

LP's proposal included significant capital improvements and the installation of new technology and a new system that would realize a substantial increase in parking revenues for MUSC. Given the value added by LP's proposal, LP did, in fact, provide the lowest responsive bid. With the rejection of AP's bid, the award should be made to LP in accordance with the Code as the lowest responsive responsible bidder. As such, LP is requesting the Chief Procurement Officer issue a decision to award the Contract to LP.

III. MUSC erred in its determination that AP submitted a responsive proposal. Upon information and belief, AP submitted a non-responsive proposal, which include but are not limited to the following:

(a) The AP Proposal failed to comply with and took exception to the Requirements set forth in Section III Scope of Work/Specifications.

Upon information and belief, the AP proposal does not meet the requirements set forth in Section III with respect to the location requirements; operation requirement and such other manner as may be shown at an administrative hearing in this matter.

(b) The AP Proposal failed to comply with the mandatory material requirements of Section IV, Information for Offerors to Submit, including but not limited to Section IV.B, IV.C, IV.E, IV.F and IV.H.

(c) The AP Price Proposal failed to comply with the mandatory essential requirements of the RFP.

There is substantial evidence that MUSC is losing significant parking revenue under with the current parking operations. There is nothing in the AP proposal that addresses this loss or provides a plan to prevent future loss. LP's proposal addresses this issue and provides the solution.

IV. The Evaluation Panel's scoring of the Proposals was arbitrary and capricious and failed to properly consider the information submitted by LP in its proposal which resulted in the proposed award to a vendor whose proposal was not most advantageous to MUSC.

The LP proposal included significant capital improvements and established a new system for parking that would add value to LP proposal. Indeed, the LP proposal would realize in a significant increase of parking revenues for MUSC. The capital improvements and added technology in the new system would be owned by MUSC after a period of time and created an additional factor making LP's proposal the most responsive and most advantageous to MUSC. The evaluation panel's scoring of LP's proposal was arbitrary and capricious in that it failed to give an accounting of the added value of the LP proposal.

V. The Evaluation Panel's scoring of the Proposals was arbitrary and capricious and failed to properly consider the established award criteria.

Upon information and belief, the panel's scoring did not properly calculate the proposals and account for the value added by LP to include but not limited to capital improvements and a new system for ensuring accountability of parking proceeds. Indeed, the LP proposal would realize in a significant increase of parking revenues for MUSC. This information submitted was not properly evaluated by the panel and the failure to account for these factors resulting in a scoring of the proposals that was arbitrary and capricious.

Upon information and belief, the panel's scoring of all of the proposals was incorrect and resulted in an erroneous award in violation of the established award criteria and as such, the Intent to Award to AP is arbitrary and capricious.

Upon administrative review, AP's bid must be rejected as nonresponsive. Furthermore, AP's bid must be rejected based on a determination that AP is a non-responsive bidder. With the rejection of AP's bid, the award should be made to LP in accordance with the Code as the lowest responsive responsible bidder. As such, LP is requesting the Chief Procurement Officer issue a decision to award the Contract to LP.

LP will rely on these arguments and such additional information as may become available through the course of our Freedom of Information Act request, further investigation and facts and issues raised by other objectors. We look forward to the administrative review and hearing of this protest and presenting our proof.

With my kindest regards, I am

Very truly yours,

James E. Smith, Jr.

JES:dea

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**Re: Lanier Parking
Bid Protest – MUSC Valet Parking Service
Solicitation No.: RFP #4806-3/15/11-9437-Z
Contract Number: PO654280
Our File No: 1219/10-0134**

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I. The Determination that AP was a responsible party is erroneous.

S.C. Reg. 19-445.2125 sets forth the factors to be considered by the State in determining the responsibility of a prospective vendor. They include whether a prospective vendor has:

- (a) available the appropriate financial, material, equipment, facility and personal resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (b) a satisfactory record of performance;
- (c) a satisfactory record of integrity;
- (d) qualified legally to contract with the State; and
- (e) supplied all necessary information in connection with the inquiry concerning responsibility.

LP contends that AP is a non-responsible vendor and that the procurement manager's determination that AP was a responsible bidder was arbitrary, capricious and erroneous as a matter of law. Upon information and belief, AP did not provide sufficient financial information



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to support a determination that it had the appropriate financial and other resources to meet all contractual requirements. Furthermore, LP contends that the information submitted by AP does not sufficiently support a determination that AP has the experience, qualifications and expertise to meet all the contractual requirements of a contract of this nature and size. Moreover, AP is not an in-state company with sufficient contact to South Carolina to be granted in-state preference which should have been given to LP.

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II. LP is the lowest responsive, responsible bidder and the award should be made to LP.

Upon administrative review, AP's bid must be rejected as nonresponsive. Furthermore, AP's bid must be rejected based on a determination that AP is a non-responsible bidder. LP did, in fact, provide the lowest responsive bid. With the rejection of AP's bid, the award should be made to LP in accordance with the Code as the lowest responsive responsible bidder. As such, LP is requesting the Chief Procurement Officer issue a decision to award the Contract to LP.

LP will rely on these arguments and such additional information as may become available through the course of our Freedom of Information Act request, further investigation and facts and issues raised by other objectors. We look forward to the administrative review and hearing of this protest and presenting our proof.

With my kindest regards, I am

Very truly yours,

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